(vi) Pharmacogenetic tests that detect genotypes, mutations, or chromosomal changes that indicate how an individual will react to a drug or a particular dosage of a drug;

(vii) DNA testing to detect genetic markers that are associated with information about ancestry; and

(viii) DNA testing that reveals family relationships, such as paternity.

(3) The following are examples of tests or procedures that are not genetic tests:

(i) An analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes;

(ii) A medical examination that tests for the presence of a virus that is not composed of human DNA, RNA, chromosomes, proteins, or metabolites;

(iii) A test for infectious and communicable diseases that may be transmitted through food handling;

(iv) Complete blood counts, cholesterol tests, and liver-function tests.

(4) Alcohol and Drug Testing—

(i) A test for the presence of alcohol or illegal drugs is not a genetic test.

(ii) A test to determine whether an individual has a genetic predisposition for alcoholism or drug use is a genetic test.

(g) *Manifestation* or *manifested* means, with respect to a disease, disorder, or pathological condition, that an individual has been or could reasonably be diagnosed with the disease, disorder, or pathological condition by a health care professional with appropriate training and expertise in the field of medicine involved. For purposes of this part, a disease, disorder, or pathological condition is not manifested if the diagnosis is based principally on genetic information.

§ 1635.4 Prohibited practices—in general.

(a) It is unlawful for an employer to discriminate against an individual on the basis of the genetic information of the individual in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment.

(b) It is unlawful for an employment agency to fail or refuse to refer any individual for employment or otherwise discriminate against any individual because of genetic information of the individual.

(c) It is unlawful for a labor organization to exclude or to expel from the membership of the organization, or otherwise to discriminate against, any member because of genetic information with respect to the member.

(d) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs to discriminate against any individual because of the individual's genetic information in admission to, or employment in, any program established to provide apprenticeship or other training or retraining.

§ 1635.5 Limiting, segregating, and classifying.

(a) A covered entity may not limit, segregate, or classify an individual, or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive the individual of employment opportunities or otherwise affect the status of the individual as an employee, because of genetic information with respect to the individual. A covered entity will not be deemed to have violated this section if it limits or restricts an employee's job duties based on genetic information because it was required to do so by a law or regulation mandating genetic monitoring, such as regulations administered by the Occupational and Safety Health Administration (OSHA). See 1635.8(b)(5) and 1635.11(a).

(b) Notwithstanding any language in this part, a cause of action for disparate impact within the meaning of section 703(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(k), is not available under this part.

§ 1635.6 Causing a covered entity to discriminate.

A covered entity may not cause or attempt to cause another covered entity, or its agent, to discriminate against an individual in violation of this part, including with respect to the individual's participation in an apprenticeship or other training or retraining

417

program, or with respect to a member's participation in a labor organization.

§ 1635.7 Retaliation.

A covered entity may not discriminate against any individual because such individual has opposed any act or practice made unlawful by this title or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

§ 1635.8 Acquisition of genetic information.

(a) *General prohibition.* A covered entity may not request, require, or purchase genetic information of an individual or family member of the individual, except as specifically provided in paragraph (b) of this section. "Request" includes conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information.

(b) *Exceptions.* The general prohibition against requesting, requiring, or purchasing genetic information does not apply:

(1) Where a covered entity inadvertently requests or requires genetic information of the individual or family member of the individual.

(i) Requests for Medical Information:

(A) If a covered entity acquires genetic information in response to a lawful request for medical information, the acquisition of genetic information will not generally be considered inadvertent unless the covered entity directs the individual and/or health care provider from whom it requested medical information (in writing, or verbally, where the covered entity does not typically make requests for medical information in writing) not to provide genetic information.

(B) If a covered entity uses language such as the following, any receipt of genetic information in response to the request for medical information will be deemed inadvertent: "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

(C) A covered entity's failure to give such a notice or to use this or similar language will not prevent it from establishing that a particular receipt of genetic information was inadvertent if its request for medical information was not "likely to result in a covered entity obtaining genetic information" (for example, where an overly broad response is received in response to a tailored request for medical information).

(D) Situations to which the requirements of subsection (b)(1)(i) apply include, but are not limited to the following:

(*1*) Where a covered entity requests documentation to support a request for reasonable accommodation under Federal, State, or local law, as long as the covered entity's request for such documentation is lawful. A request for documentation supporting a request for reasonable accommodation is lawful only when the disability and/or the need for accommodation is not obvious; the documentation is no more than is sufficient to establish that an individual has a disability and needs a reasonable accommodation; and the documentation relates only to the impairment that the individual claims to be a disability that requires reasonable accommodation;

(*2*) Where an employer requests medical information from an individual as

418